

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

DORENE GIACOPINI,

No. C-04-1089 MMC

Plaintiff,

**ORDER GRANTING PLAINTIFF'S
MOTION TO AMEND AS A MATTER OF
RIGHT; DENYING DEFENDANT'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT AND MOTION TO DISMISS
AS MOOT; VACATING HEARINGS**

v.

CRYSTAL CRUISES, INC.,

Defendant.

(Docket Nos. 23, 26)

Before the Court are the following motions: (1) defendant Crystal Cruises, Inc.'s ("Crystal") motion for partial summary judgment and motion to dismiss, filed October 24, 2005; and (2) plaintiff Dorene Giacopini's motion, filed November 11, 2005, to amend her complaint as a matter of right or, in the alternative, for leave to file a First Amended Complaint.

Rule 15(a) of the Federal Rules of Civil Procedure authorizes a party to "amend the party's pleading as a matter of course at any time before a responsive pleading is served[.]" See Fed. R. Civ. P. 15(a). Although Crystal has filed a prior motion to dismiss, in addition to the instant motion for partial summary judgment and motion to dismiss, it has never filed an answer to plaintiff's complaint. Motions to dismiss and motions for summary judgment are not "responsive pleadings" within the meaning of Rule 15(a). See Crum v. Circus Circus Enterprises, 231 F.3d 1129, 1130 n.3 (9th Cir. 2000); see also Kirk v. United

1 States, 232 F.2d 763, 770 (9th Cir. 1956). Accordingly, as no responsive pleading has
2 been served, plaintiff is entitled to file her amended complaint as a matter of right.

3 Plaintiff, in her First Amended Complaint, makes numerous changes to the claims
4 alleged in the instant action, including deleting her cause of action for violation of the
5 Americans With Disabilities Act, limiting the scope of her state law claims for violation of
6 California Civil Code §§ 51 and 54 and California Business and Professions Code § 17200
7 to occurrences in California, deleting all requests for injunctive relief, adding a request for
8 restitution to her § 17200 claim, adding new causes of action for fraudulent
9 misrepresentation, negligent misrepresentation, negligence, and negligent and intentional
10 infliction of emotional distress, and alleging federal jurisdiction now exists over the
11 amended action pursuant to 28 U.S.C. § 1333. In light of the significant changes to the
12 scope of the instant action, the Court finds Crystal's motion for partial summary judgment
13 and motion to dismiss is moot.

14 Accordingly, for the reasons set forth above,


15 1. Plaintiff's motion to amend her complaint as a matter of right is hereby
16 GRANTED, and the December 16, 2005 hearing on the motion is hereby VACATED.
17 Plaintiff shall file her First Amended Complaint forthwith.

18 2. Crystal's motion for partial summary judgment and motion to dismiss is hereby
19 DENIED as moot, and the December 2, 2005 hearing on the motion is hereby VACATED.
20 Crystal may, of course, file a new motion for summary judgment or a new motion to dismiss
21 addressing the causes of action asserted in the First Amended Complaint.

22 This order terminates Docket Nos. 23 and 26.

23 **IT IS SO ORDERED.**

24 Dated: November 17, 2005

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MAXINE M. CHESNEY
United States District Judge